LEONG CHEE KONG & ANOR

v.

TAN LENG KEE (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-74-98]
27 SEPTEMBER 2000

CIVIL PROCEDURE: *Stay of proceedings - Stay of petition for probate pending appeal - Whether refusal of stay would result in irreparable damage to party opposing petition - Whether petitioner would be able to easily dispose off assets pending appeal - Whether status quo of parties to be maintained pending appeal*

The plaintiffs were the brothers of one Leong Chee Keong ('the deceased') whilst the defendant claimed to be the lawful wedded wife. Both parties claimed that they were entitled to the estate of the deceased and made an application for probate respectively. The plaintiffs' appearance to the defendant's probate action was struck out on a procedural objection raised by the defendant. The court therein proceeded to admit the statutory declaration by the defendant as evidence of the Will of the deceased which the defendant alleged was lost. The plaintiffs had since appealed to the Court of Appeal. Meanwhile, the defendant's application to strike out the plaintiff's probate action was struck off by the Senior Assistant Registrar. The defendant's appeal to the judge in chambers was allowed on the basis that the plaintiffs' probate action had been automatically consolidated with the defendant's probate action upon the entry of an appearance thereto. The plaintiffs then appealed to the Court of Appeal against that decision and have now applied for stay pending the said appeal.

Held:

[1] The special circumstances test is the ultimate test in determining whether to warrant a stay. Whether the appeal would be rendered nugatory can be construed to be a special circumstance warranting a stay and the stay would certainly be granted when there are other prevailing factors to be considered such as to preserve the subject matter of the dispute. Merits in the appeal are not special circumstances to warrant a stay.

[2] If stay was not granted, the estate would fall into the sole control of the defendant and the plaintiffs would suffer irreparable damage. The plaintiffs would not be able to return to their original positions. The plaintiffs would

be prevented from pursuing with their probate action and the defendant would proceed to seal the grant of its probate to the exclusion of the plaintiffs. The defendant would take control of the estate of the deceased together with all his assets without the necessity of going into the rigmarole of the trial.

[3] The defendant could easily dissipate the estate of the deceased thereby depriving the plaintiffs the right to obtain a complete account of the assets concerned. The plaintiffs should not be expected to wait patiently for a hearing date from the Court of Appeal without being granted a stay. Further, the defendant could also easily dispose of the other assets of the deceased not known to the plaintiffs.

[Application for stay allowed.]

Case(s) referred to:

All Persons In Occupation Of The House And The Wooden Stores Erected On A Portion Of Land Held Under Grant No: 26977 For Lot 4271 In The Township Of Johor Bahru, Johor v. Punca Klasik Sdn Bhd [1998] 5 CLJ 49 ***(refd)***

Beh Lee Liang v. Chew Sah Suak & Anor [1996] 1 CLJ 173 ***(refd)***

Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584 ***(refd)***

Chellapa K. Kalimuthu v. Sime UEP Properties Bhd [1999] 3 CLJ 247 ***(refd)***

Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No 2) [1998] 3 CLJ 685 ***(refd)***

Gentali (M) Sdn Bhd v. Kawasaki Sunrock Sdn Bhd [1997] 1 CLJ 70 ***(refd)***

Development & Commercial Bank Bhd v. Che Wan Development Sdn Bhd & Ors [1989] 2 CLJ 1200 ***(refd)***

Development & Commercial Bank Bhd v. Lam Chuan Company & Anor [1989] 1 CLJ 192 ***(refd)***

H & R Johnson Tiles Limited & Anor v. H & R Johnson (Malaysia) Bhd [1998] 3 CLJ Supp 441 ***(refd)***

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(refd)***

Jenkins v. Gaisford and Thring, Re Jenkins [1863] 3 SW & Tr 93 ***(refd)***

Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] 3 MLJ 457 ***(refd)***

MBf Property Services Sdn Bhd v. Madihill Development Sdn Bhd (No 3) [1998] 5 CLJ 461 ***(refd)***

Mohamed Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126 ***(refd)***

Paganelli Sdn Bhd v. Care-Me Direct Sales Sdn Bhd [1999] 2 CLJ 669 ***(refd)***

Perwira Affin Bank Bhd v. Hj. Zakaria Hj Ismail & Ors [1998] 2 CLJ 770 ***(refd)***

Re Chalcraft, Chalcraft v. Giles and Rance [1948] P 222 ***(refd)***

Re Chor Saw Oon, Ex P Tan Jiak Chye [1999] 7 CLJ 119 ***(refd)***

Salim Ismail & Ors v. Lebbey Sdn Bhd (No 1) [1997] 1 CLJ 98 ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***

Serangoon Garden Estate Ltd v. Ang Keng [1953] MLJ 116 ***(refd)***

Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***

Tac Construction & Trading v. Bennes Engineering Berhad (No 2) [1999] 2 CLJ 518 ***(refd)***
Tan Soo Bing & Ors v. Tan Kooi Fook [1997] 1 CLJ 556 ***(foll)***
Tneoh Hong Seng v. Dayani Sdn Bhd [1998] 2 CLJ 79 ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 3
Rules of the High Court 1980, O. 71
Wills Act 1959, s. 5(2)

For the plaintiffs - Barry Goh MengYew; M/s Iza Ng Yeoh & Kit
For the defendant - Amarjeet Singh; M/s Zubeda & Amarjeet

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Facts Of The Case

Both the plaintiffs are brothers to Leong Chee Keong (hereinafter referred to as the "deceased") who died on 24 July 1996 of heart failure at the parking lot of the cultural market at Kuala Lumpur. At the time of his death, the deceased was said to be a professing Christian. The deceased was survived by his mother and other siblings, namely:

Particulars

Number	Name	Relationship with the deceased
(1)	Pang Yew Mooi (f)	Mother
(2)	Leong Chee Kong (the first plaintiff)	Older brother
(3)	Leong Siew Yin (f)	Older sister
(4)	Leong Nyet Yin @ Leong Lan Yin (f)	Older sister
(5)	Leong Chee Moon (the second plaintiff)	Younger brother
(6)	Leong Chee Hean	Younger brother
(7)	Leong Chee Chon	Younger brother
(8)	Leong Chee Mun @ Leong Chee Man	Younger brother
(9)	Leong Fong Yin (f)	Younger sister
(10)	Leong Chee Soon	Youngest brother

It would be pertinent to point out that the deceased's mother by the name of Pang Yew Mooi (f) and youngest brother by the name of Leong Chee Soon have since died on 8 October 1996 and 10 July 1997 respectively. At the time of his death, the deceased had no issue and was not married to any person whosoever. That being the case, the deceased's lawful beneficiaries who are still alive would constitute his surviving siblings and they are the ones who should be entitled to obtain administration and to reap the benefit of the estate of the deceased pursuant to the terms of the Distribution Act 1958. That was what the plaintiffs thought and the plaintiffs blissfully took their own sweet time to extract the letters of administration. Out of the blue, the defendant came into the picture. It caught the plaintiffs by surprise.

The defendant, a woman, acted swiftly. Soon after the death of the deceased, the defendant forcibly entered into the deceased's residence at Lot FTH/7, 8th floor, Le Jardine Deluxe, Pandan Indah, Kuala Lumpur and she took possession of certain documents, share certificates, personal effects and chattels belonging to the estate of the deceased. It was averred that due to the defendant's wrongful intermeddling with the assets of the estate of the deceased, various documents and other items which, *inter alia*, included a brief case containing various important documents and share certificates were lost and these documents were now said to be in the possession of the defendant. It was also averred that the defendant or even her agent had wrongfully taken possession of a volvo automobile bearing registration number BBW1128 belonging to the estate of the deceased. Such was the wrath of a woman.

Oral intimations emanating from the defendant to the surviving siblings of the deceased together with a letter dated 16 August 1996 from the defendant's then solicitors Messrs Zubeda & Co conveyed the messages that the defendant was the legal wife and lawful widow of the deceased and that she was in possession of a photocopy of the last Will of the deceased. The then solicitors of the surviving siblings of the deceased Messrs H B Lee replied spontaneously and by letter dated 23 August 1996 denied the allegations of the defendant and sought documentary proof of the defendant's allegations as contained in that messages. But the defendant remained aloof and she refused to provide such proof and this was conveyed to the plaintiffs by way of a letter from the defendant's then solicitors dated 26 August 1996.

It was averred that the deceased was not married to the defendant at any time. It was also averred that prior to the death of the deceased, the deceased had declared to the surviving siblings that he was not married to the defendant at any time. It was said that the deceased had been married once before and that marriage was to Wong Poo Chin (f), but that marriage had been dissolved by order of the High Court on 15 May 1991. It was the plaintiffs' stand that at the time of the deceased's death, the deceased was a divorcee, single and unmarried.

It was averred that the defendant was married to Tan Chiong Teh @ Tan Kee Thoo and that marriage was solemnised on 7 May 1969 and it subsisted for more than 15 years until 5 June 1984 when the said marriage was dissolved by order of the High Court of Malaya presiding at Kuala Lumpur. It was also averred that the defendant had by her own statements to various parties declared that she was not married to any person after her divorce from Tan Chiong Teh @ Tan Kee Thoo. The defendant's marital status can be described as a divorcee, single and available.

After the death of the deceased, the plaintiffs became aware that there was an attempt to cause the transfer of many of the shares belonging to the deceased and those shares were contained in the deceased's Central Depository System Account with Mayban Securities Sdn Bhd. It seemed that the defendant used transfer forms purportedly and allegedly signed by the deceased for that purpose. The surviving siblings of the deceased have made a complaint to the Kuala Lumpur Securities Commission by way of a letter dated 21 August 1996 and they too have lodged a police report on 17 August 1996.

The plaintiffs also became aware, much to their dismay, that subsequent attempts were made to transfer the deceased's shares on the basis of transfer forms purportedly and allegedly signed by the deceased. The particulars of those shares may be itemised as follows:

(1) 6,000 ordinary shares and 2,000 warrants of Amsteel Corporation Berhad;

(2) 18,000 shares of Olympia Industries Berhad; and

(3) 1,000 shares of Kumpulan Emas Berhad under share certificate no: 00320822.

The plaintiffs verily believed that the signatures purportedly and allegedly made by the deceased on the transfer forms were forged. By letter dated 13 March 1997, the solicitors for the deceased's surviving siblings gave notice to the defendant's solicitors of the nature of the interest of the deceased's surviving siblings, which necessarily included both the plaintiffs, and by that notice it was categorically denied that the defendant was ever the deceased's lawful wife and by that notice too it categorically denied the existence of any Will of the deceased. The plaintiffs reiterated their demand by demanding from the defendant for proof of her allegations as contained in the messages alluded to earlier on.

Despite the said notice, the defendant remained stubborn and on her own accord proceeded with her application for probate in the common form. The defendant refused to inform the plaintiffs in regard to the particulars and the nature of her application. The defendant alleged by letter through her solicitors dated 27 March 1997 that she was married to the deceased in 1981 in

accordance with Chinese custom and she further intimated about her knowledge of the existence of the last Will of the deceased.

On the other end of the scale, the plaintiffs denied the defendant's interest in the estate of the deceased and further denied all the defendant's allegations as contained in the letter dated 27 March 1997. The plaintiffs averred that the defendant was attempting to obtain probate over the estate of the deceased which would ultimately deprive the deceased's surviving siblings from enjoying and taking their rights to the estate of the deceased.

The plaintiffs wasted no time. To the plaintiffs, time was indeed precious. Accordingly, the plaintiffs with the consent of the deceased's surviving siblings filed a petition to obtain letters of administration in respect of the estate of the deceased under Petition No: S1-31-115-97 and the plaintiffs proceeded further by filing, on 30 April 1997, a caveat in respect of the estate of the deceased.

Not to be outwitted, the defendant also filed a petition for probate under O. 71 of the Rules of the High Court 1980 ("RHC") *vide* Probate no: S4-32-474-1996 alleging, *inter alia*, that she was entitled to probate in respect of the estate of the deceased by virtue of her status as the lawful wife of the deceased on the basis of a Chinese wedding that was said to have been carried out in 1981. It was also said that her marriage to the deceased subsisted thereafter until the deceased died of a heart attack. It was also said that the defendant was named as the sole beneficiary in the last Will and testament of the deceased. It was also said that when the defendant came to know of the existence of the deceased's Will, she quickly made concerted attempts to contact the witnesses to the said Will and these witnesses were said to be Hon Lin Lin and Hon Yin Yin of no: 19, Jalan Sri Aman, Batu 8, Cheras 43200 Selangor and no: 33, Jalan Delima, Lian Seng Garden 86000 Kluang respectively. The defendant now said that she could not locate the Will of the deceased and she claimed that the Will was lost.

Now, if the Will was in fact in existence it would certainly add colour to the whole case, after all, a Will is said to be a declaration of the intention of the testator in respect of his property which he desires to be carried out after his death. Certain formalities must be complied with before a Will takes effect, namely:

(1) it must be in writing;

(2) it must be signed by the testator or by some other person duly authorised by the testator and it is signed in the presence of the testator and by his direction; and

(3) the signature must be affixed or acknowledged by the testator as the signature of his Will and that signature is affixed in the presence of two or more witnesses present at one and the same time; it goes without saying that due execution of the Will must be proved (*Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] 3 MLJ 457).

It is wholly immaterial whether a Will is drafted wholly or partly in ink or in pencil. The word "writing" is said to include typewriting, printing, lithography, photography, electronic storage or transmission or any other method of recording information or fixing information in a form capable of being preserved (Interpretation Acts 1948 and 1967 (Act 388), particularly s. 3 thereof). For a Will to be valid, it is essential that it should be signed by the testator. But, under s. 5(2) of the Wills Act 1959 (Act 346) if the Will is signed by another person on behalf of the testator, that in itself would be sufficient. So long as the testator leaves a mark or an initial which are intended to represent a signature to a Will, it would be considered sufficient in law. Again, an incomplete signature would be considered as sufficient when there is evidence that the testator intended that signature to be the best that he could affix to the Will (*Re Chalcraft, Chalcraft v. Giles and Rance* [1948] P 222, [1948] 1 All ER 700). The case of *Jenkins v. Gaisford and Thring, Re Jenkins* [1863] 3 SW & Tr 93 even goes to the extent of holding that a stamped signature may even be sufficient. Reverting back to the narration of the facts, the defendant then proceeded to produce a statutory declaration purportedly made by the two witnesses to the said Will and it was dated 15 November 1996. Briefly, that statutory declaration stated that the deceased had invited the two witnesses to attend the deceased's execution of the Will at the deceased's address at no: 92, Persiaran Lemak, Taman Segar, 56100 Kuala Lumpur and that the deceased had informed the two witnesses that the deceased intended to leave his entire estate to the defendant – his lawful wife. At this juncture, it would be interesting to reproduce the Statutory Declaration that has since been exhibited as exh. 'A' of the defendant's affidavit that was affirmed on 4 May 1999 as reflected in encl. 22. That statutory declaration was worded thus:

STATUTORY DECLARATION

We, HON LIN LIN (I.C. No. 7674796) of No, 19, Jalan Sri Aman, Batu 8, Cheras 43200 Selangor and HON YIN YIN (I.C. No. 5855240) of No. 33, Jalan Delima, Lian Seng Garden, 86000, Kluang, do solemnly and sincerely declare as follows:

1) In this declaration the following terms shall have the following meanings.

'DECEASED' means Mr Leong Chee Keong who died on 24th July, 1996

'WILL' means the last testamentary document made and executed by Mr. Leong Chee Keong, the deceased.

2) We are the two subscribing witnesses to the last Will and Testament of the deceased.

3) The deceased executed the Will some time in the month of March 1995, which date cannot be stated more exactly, by signing his name at the foot or end of the Will, meaning and intending the same to be his final signature to the Will. The deceased signed his name in the presence of us as the subscribed witness(es) thereto, both of us being present at the same time. After the deceased had so signed we attested and subscribed the Will in the presence of the deceased.

4) The deceased had executed the Will at his residence known as No. 92, Persiaran Lemak, Taman Segar, 56100 Kuala Lumpur and at the time of execution of the Will the deceased had informed us that he had invited us to witness the execution of the Will by him. The deceased had also informed us that by the Will he intended to leave his entire estate to his lawful wife, Madam Tan Leng Kee as the sole beneficiary.

5) The deceased did not inform us anything else in respect of the contents of the Will and accordingly, we do not know whether or not any executor/ executrix was appointed under the Will.

AND each of us makes this solemn declaration conscientiously believing the same to be true by virtue of the provisions of the Statutory Declaration Act 1960.

Subscribed and solemnly declared by the abovenamed HON LIN LIN and HON YIN YIN on the 15th day of November, 1996 at Kuala Lumpur through the interpretation of Hon Yin Yin the said Hon Lin Lin having been first sworn (that he) had truly, distinctly and audibly translated the contents of this Declaration to the deponents HON LIN LIN and HON YIN YIN and that he would truly and faithfully interpret the oath about to be administered unto him the said Hon Lin Lin

Sgd. (Illegible)
(HON LIN LIN)

Sgd. (Illegible)
(HON YIN YIN)

Before me,
Sgd. (Illegible)
Commissioner for Oaths

PESURUHJAYA SUMPAH
MALAYSIA No. W 126 CHOY LIM CHOO

Bilik 821, Tingkat 8,
Sun Kompleks
Jalan Bukit Bintang,
55100 Kuala Lumpur.

The plaintiffs were unhappy and they vehemently denied all the allegations advanced by the defendant in the defendant's allegations as contained in her petition for probate. Without prejudice to the generality of the plaintiffs' denial, the plaintiffs proceeded further to aver that:

(1) the defendant was not and has never been the lawful wife of the deceased;

(2) The defendant has never married the deceased either by Chinese ceremony or by any other ceremony;

(3) The deceased had never prior to his death made any Will purporting to appoint the defendant as the sole beneficiary to the deceased's estate;

(4) the deceased was not living with the defendant as at the date of the deceased's death as alleged by the defendant;

(5) the defendant was never in possession nor had sight of the copy of the Will of the deceased at any time;

(6) the defendant had procured the services of the two witnesses to falsely declare the contents of the statutory declaration and that the two witnesses did not witness the execution of the Will by the deceased;

(7) further and by way of an alternative and without prejudice to the aforesaid averments, it was averred that there was no due execution of the said Will in any event because the two witnesses did not understand the English language and would not have been capable of lawfully witnessing the execution of that Will; and

(8) further and by way of an alternative and without prejudice to the aforesaid averments, the witnessing of the execution of the Will by the two witnesses would have been bad in law and, in any event, any such Will made by the deceased would have been bad at law and in fact.

For the aforesaid reasons, the plaintiffs premised that the defendant had no right at any time to make any application to obtain probate or administration in respect of the estate of the deceased. Consequently, so the plaintiffs said, the claim by the defendant that she was entitled to obtain probate over the estate of the deceased was indeed untrue and false in the extreme.

I have taken an arduous route to narrate the facts. It cannot be denied that the facts were indeed interesting. Was this a case of two divorcees being attracted to one another and upon the death of one, the other quickly scuttled for the worldly possessions of the dead partner? Was the defendant a kept woman of the deceased – in ordinary jargon was the defendant a mistress of the deceased? I must restrain myself from answering the questions posed. The trial should be the best avenue for the parties to ventilate and advance their grievances.

The defendant argued that she was the deceased's wife according to Chinese custom and she even claimed to be a beneficiary under a Will of the deceased. This was what the defendant deposed in para. 3 of her affidavit in support of her application for probate in relation to the case no: S4-32-474-96 (see exhibit "LCK 3" of encl. 35):

> Saya adalah isteri kepada Leong Chen Keong, simati, berdasarkan perkahwinan Cina kami yang dilangsungkan pada tahun 1981. Semenjak perkahwinan kami itu simati dan saya telah tinggal bersama sebagai suami isteri, sehingga tarikh kematiannya pada 24hb Julai 1996.

As against this, it must be borne in mind that the plaintiffs have uncontrovertible proof that the defendant was, in fact, the registered wife of Tan Chiong Teh @ Tan Kee Thoo from 7 May 1969 to 6 July 1984. There was also uncontrovertible proof that the deceased was married to Wong Poo Chin (f) until 15 May 1991. Perhaps it would not be out of place to reproduce the certificate of making the decree nisi absolute in relation to the deceased's marriage to Wong Poo Chin (f) as exhibited as an exhibit marked as "LCM – 7" in the affidavit of the second plaintiff that was affirmed on 6 October 1999 as seen in encl. 34:

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY, MALAYSIA
(CIVIL CASES)
DIVORCE PETITION NO. S7-33-219-89

BETWEEN

WONG POO CHIN (f) – I.C. 7837455 ... PETITIONER

AND

LEONG CHEE KEONG – I.C. 2866316 … RESPONDENT

AND

TAN LENG KEE (f) … CO-RESPONDENT

CERTIFICATE OF MAKING DECREE NISI ABSOLUTE
(DIVORCE)

Referring to the decree made in this cause on the 8th day of December, 1989 whereby it was decreed that the marriage solemnised on the 14th day of December, 1968 between Wong Poo Chin (f) the Petitioner and Leong Chee Keong the Respondent be dissolved unless sufficient cause be shown to the Court within three months from the making thereof why the said decree should not be made absolute, and no such cause having been shown, it is hereby certified that the said decree was on the 8th day of February 1990 made final and absolute and that the said marriage was thereby dissolved.

Dated this 15th day of May 1991.

Sgd. (Illegible)

UNAIZAH BT MOHD.
Senior Assistant Registrar
High Court
Kuala Lumpur

and it is interesting to note that the co-respondent is none other than the defendant herself. Exhibit "LCM7" of encl. 34 also exhibited the certificate of making the decree nisi absolute in relation to the defendant's marriage to Tan Chiong Teh @ Tan Kee Thoo and it was worded as such:

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(FAMILY AND PROPERTY DIVISION)
DIVORCE PETITION NO: 457 OF 1983

The joint Petition of:

Tan Leng Kee (f))
92, Persiaran Lemak,)
Taman Segar, Batu 6½,)
Cheras, Kuala Lumpur.)
Tan Chiong Teh @ Tan Kee Thoo)
39 Lengkongan Venatava,)
Taman Kaya, Jalan Ipoh)
Kuala Lumpur.) … Joint Petitioners

CERTIFICATE OF MAKING DECREE NISI ABSOLUTE
(DIVORCE)

Referring to the Decree made in this cause on the 5th day of March, 1984, whereby it was Decreed that the marriage solemnised on the 7th day of May, 1969 before the Deputy Registrar of Marriages, Kuala Lumpur between Tan Leng Kee (f) (then spinster) and Tan Chiong Teh @ Tan Kee Thoo, the Joint Petitioners herein be dissolved unless sufficient cause be shown to the Court within three (3) months from the making thereof why the said decree should not be made absolute, and no such cause having been shown, it is hereby certified that the said Decree was on the 5th day of June, 1984 made final and absolute and that the said marriage was thereby dissolved.

Dated the 6th day of July, 1984.

Sgd. (Illegible)
Senior Assistant Registrar,
High Court, Kuala Lumpur.

The defendant must have played a major role in breaking up the marriage of the deceased with Wong Poo Chin (f) and whether the defendant was in fact the wife of the deceased according to Chinese custom can only be resolved at the trial proper.

It was argued that Chinese custom prohibits a woman from marrying more than one husband at the same time and flowing from that it was pointed out that it was next to impossible for the defendant to be the wife of the deceased according to Chinese custom and at the same time being the registered wife of Tan Chiong Teh @ Tan Kee Thoo in the year 1981. In *Beh Lee Liang v. Chew Sah Suak & Anor* [1996] 1 CLJ 173 a lecturer with the Chinese department of the University of Malaya took the stand in the witness box and testified in regard to Chinese culture and her testimony greatly benefited the court. Here, at this point of time, without the benefit of an expert in Chinese customary marriages, I cannot enter into the realm of conjecture and decide the dispute on affidavit evidence. The matter should proceed to trial.

In the defendant's petition for probate *vide* S4-32-474-1996, which was an uncontested application involving only one party, the defendant failed to produce the copy of the Will and even went to the extent of alleging that she had lost the Will. In its place, the defendant produced a statutory declaration signed by the two witnesses who also alleged to have witnessed the signing of the Will. On these facts, it was rightly argued that the scenario was indeed suspicious and it warranted a trial in order to determine whether there was in fact a Will and if there was such a Will as to how the defendant could have lost such an important document in a matter of months and yet was able to locate the two witnesses. Indeed the best recourse would be to cross-examine the defendant in order to discover the truth of her allegations.

Whether the sting of the statutory declaration was greatly reduced by the inability of Hon Lin Lin to read and understand the statutory declaration which was drafted in the English language and that the assistance of Hon Yin Yin was requested to translate the statutory declaration before Hon Lin Lin signed the document can only be determined in the course of the trial.

It must be emphasised that the claims of either party have yet to be adjudicated upon on its merits. The plaintiffs were desirous of entering an appearance in regard to probate no: S4-32-474-1996 but the defendant raised a procedural

objection in regard to the format of appearance and the plaintiffs were left in a lurch. The plaintiffs lodged a caveat on the estate of the deceased and the defendant eventually answered by a warning against the caveat. The plaintiffs quickly served their appearance to the warning on 13 November 1997 but unfortunately was confronted by a procedural objection advanced by the defendant to the effect that the plaintiffs had allegedly failed to state their interest thereto notwithstanding the fact that the defendant was aware and knew of the plaintiffs' interest to the estate of the deceased at all times. The defendant then sought for a hearing of its procedural objection and the court that handled the S4-32-474-1996 probate matter ordered written submissions to be filed. On 8 September 1998, the court accepted the defendant's objection and struck out the plaintiffs' appearance in the S4-32-474-1996 probate matter and the court then proceeded to allow the statutory declaration to be admitted as evidence of the contents of the Will. The plaintiffs, being aggrieved, have since appealed to the Court of Appeal against that decision. At the time of writing this judgment, the Court of Appeal has yet to convene to listen to the plaintiffs' appeal.

The plaintiffs did not lose hope and they proceeded with the present probate action. The defendant entered conditional appearance and applied by way of encl. 7 to strike out the present probate action. The senior assistant registrar ("SAR") dismissed the defendant's application in encl. 7 with costs on 21 April 1999. The defendant then lodged an appeal to the judge in chambers and my immediate predecessor in the person of James Foong J allowed the appeal without costs on 10 August 1999. It seemed that James Foong J came to that decision because his Lordship considered that the present probate action cannot be struck out because it had been automatically consolidated with the S4-22-74-1998 matter "upon the entry of an appearance thereto" (see exh. "LCM 6A" of encl. 34 where the written judgment of James Foong J has been exhibited). The plaintiffs appealed to the Court of Appeal against the decision of James Foong J.

By way of encl. 36, the plaintiffs sought an order from this court to stay the order of James Foong J dated 10 August 1999 pending their appeal to the Court of Appeal. It would be opportune to say that encl. 36 was a summons in chambers filed by the plaintiffs seeking the following orders:

(a) that the execution and effect of the order of August 10, 1999 of this court be stayed until the merits of the plaintiffs' appeal to the Court of Appeal against the said orders be heard and determined (hereinafter referred to as "the first prayer");

(a) that the execution and effect of the order of August 10, 1999 of this court be stayed until the merits of the plaintiffs' appeal to the Court of Appeal against the said order be heard and determined (hereinafter referred to as "the second prayer");

(b) that the costs of the application be subjected to the decision of the Court of Appeal in the said appeal (hereinafter referred to as "the third prayer");

(c) other or further relief and or order as this Honourable Court shall deem fit and just (hereinafter referred to as "the fourth prayer")."

I must make two observations in relation to encl. 36. The first would be that there are two prayers bearing the alphabet "a". The second would be that the two prayers bearing the alphabet "a" were couched in the same language seeking the same orders.

The Law

The Court of Appeal in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 adopted a firm stand against the prevailing view that an applicant had to show special circumstances warranting a stay of execution or proceedings and in the process thereof it sought to overturn the time honoured principle enshrined in the case of *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116. In an excellent judgment, Gopal Sri Ram JCA in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd (supra)* aptly said:

> In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) of the Courts of Judicature Act 1964, is that the appeal to this court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the *status quo*.

His Lordship Gopal Sri Ram JCA in *See Teow Guan* in fine language gave some guiding principles on how to apply the nugatory approach. This was what his Lordship said:

(1) that the stay would not be granted where the appeal is plainly and "obviously unarguable" (see page 611A of the report);

(2) that the facts demonstrate "a reason or an appropriate case to warrant the exercise of discretion in his favour" (see page 609F where his Lordship referred to the decision of Kirby P. in *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42);

(3) that the stay "Will be fair to all parties" (see page 609G where his Lordship referred to the decision of Kirby P. in *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42); and

(4) that the balance of convenience would favour granting the stay (see page 609H where his Lordship referred to the decision of Kirby P. in *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42).

Unfortunately, the Court of Appeal in *See Teow Guan* did not refer to two decisions emanating from the then Supreme Court and the then Federal Court that were decided earlier in point of time than *See Teow Guan* and would definitely serve as binding precedents. These two earlier decisions were none other than *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 and *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161 where the Highest Courts in the country applied vigorously the special circumstances test in deciding whether a stay ought to be given or not.

The two divergent tests in deciding whether a stay ought to be granted or not, *viz*, the nugatory test or the special circumstances test gave rise to confusion and uncertainty for the subordinate courts. Generally, the courts have adopted three approaches in determining whether a stay ought to be granted or otherwise:

(1) the High Court duly bound on the principles of stare decisis to follow *Jasanusa Sdn Bhd* and *Dato' Hj Ghani Gilong* by applying the special circumstances test;

(2) the High Court preferring to adopt and apply the nugatory test propounded in *See Teow Guan* notwithstanding the decisions in *Jasanusa Sdn Bhd* and *Dato' Hj Ghani Gilong*; and

(3) the High Court adopted a safe approach by concluding that there are now two tests and that both these two tests should be applied simultaneously or in substitution to each other.

I will now briefly allude to these three tests by way of an elaboration.

The Special Circumstances Test

This is a popular test adopted by the judges of the High Courts in the country. For starters, reference should be made to the case of *All Persons In Occupation Of The House And The Wooden Stores Erected On A Portion Of Land Held Under Grant No: 26977 For Lot 4271 In The Township Of Johor Bahru, Johor v. Punca Klasik Sdn Bhd* [1998] 5 CLJ 49 where the court at p. 54 of the report said:

> These two authorities from the highest courts in the country, in no certain terms, entrenched the special circumstances approach in the context of a stay of execution of a judgment and, I may add, a *fortiori* it must also be extended to apply to an application for a stay of proceedings in order to preserve the integrity of an appeal.

This would be followed by an array of cases beginning with *MBf Property Services Sdn Bhd v. Madihill Development Sdn Bhd* (No 3) [1998] 5 CLJ 461 and extending to *Tneoh Hong Seng v. Dayani Sdn Bhd* [1998] 2 CLJ 79 and proceeding further to *Perwira Affin Bank Bhd v. Hj. Zakaria Hj Ismail & Ors* [1998] 2 CLJ 770. All these cases vigorously applied the special circumstances approach.

The case of *Tac Construction & Trading v. Bennes Engineering Berhad (No 2)* [1999] 2 AMR 1621 gave an in depth exposition of both the special circumstances and the nugatory approaches and it would be ideal to refer to that case. There the court said that the (see p. 1624 of the report, especially the headnote thereto):

> Two approaches have been adopted by the courts when determining an application for a stay pending appeal namely the special circumstances approach, and the nugatory approach. What constitutes special circumstances however, is beyond definition as the parameters of special circumstances are wide. In the absence of any statutory provisions pertaining to either of the said approaches, it is thus for the judge, when adopting the special circumstances approach, to determine on the facts, what constitutes special circumstances. Thus before a stay may be granted, there must be materials before the Judge, to decide upon. The nugatory approach on the other hand is an approach that may be adopted by the courts so as to prevent an appeal, if successful, from being rendered nugatory.

The Nugatory Approach

My brother judge, Jeffrey Tan J in *Re Chor Saw Oon, Ex P Tan Jiak Chye* [1999] 7 CLJ 119 adopted and applied the nugatory approach as propounded by Gopal Sri Ram JCA in *See Teow Guan* without referring to *Jasanusa Sdn Bhd* and *Dato' Hj Ghani Gilong* at all.

The then Federal Court speaking through Abdul Hamid J (who later rose to be the Lord President of the Supreme Court) in the case of *Mohamed Mustafa v. Kandasami (No 2)* [1979] 2 MLJ 126, 127 explained the nugatory approach in this way:

> On the question of stay of execution it is I think settled law that the granting of such a stay is a matter of the court's discretion, and it is true that the exercise of such discretion must be founded upon established judicial principles. One of the determining factors that calls for consideration is whether by not making an order to stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.

A Mixture Of The Two Tests – The Safe Approach

Clement Skinner JC in *Paganelli Sdn Bhd v. Care-Me Direct Sales Sdn Bhd* [1999] 2 CLJ 669, adopted the two tests in deciding the issue of a stay. This was what his Lordship said at p. 671 to p. 672 of the report:

> Those principles have almost without exception required an applicant to show special circumstances to warrant the grant of a stay (see *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131; *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1975] 2 MLJ 105; *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 2 MLJ 119). The Court of Appeal has however in recent times advocated a more practical, flexible and less stringent approach with the primary object of ensuring that an appeal, if successful, will not be rendered nugatory. This is how his Lordship Gopal Sri Ram JCA speaking for the court in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 expressed it at p 610:
>
> > In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) of the Courts of Judicature Act 1964, is that the appeal to this court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the *status quo*.
>
> Reading the decision of the Federal Court in the cases of *Dato' Hj Ghani Gilong* and *Jasanusa Sdn Bhd*, and that of the Court of Appeal in *See Teow Guan*, it seems to me that the approach I should take in considering this application is to see if the applicant can either show special circumstance or demonstrate that an appeal if successful would be rendered nugatory.

Continuing at p. 673 of the report, his Lordship rounded it up by saying that:

> Notwithstanding that the allegations of error do not constitute special circumstances, adopting the more flexible approach I should nevertheless consider them as demonstrating an arguable case on appeal and regard such prospect as one of the factors I should take into account in deciding whether an appeal if successful would be rendered nugatory.

Earlier on, Haidar J (now JCA) in *H & R Johnson Tiles Limited & Anor v. H & R Johnson (Malaysia) Bhd* [1998] 3 CLJ Supp 441, 445 alluded to the two tests in this way:

> What I understand from the judgment in *See Teow Guan* is that the applicant need not rely on special circumstances but would suffice to rely on the ground that if the appeal, if successful, should not be rendered nugatory, it being the

> paramount consideration in an application for stay. In my view, it follows that if the applicant chose to rely on special circumstances as well, there would be no bar for the applicant to do so.

and interestingly, his Lordship cited the case of *Jasanusa Sdn Bhd* to support his Lordship's view that the special circumstances approach was one of the approaches to be considered in deciding whether there ought to be a stay or otherwise. His Lordship also relied on the decision of the Court of Appeal in the case of *Gentali (M) Sdn Bhd v. Kawasaki Sunrock Sdn Bhd* [1997] 1 CLJ 70 and that case seemed to suggest that the nugatory approach was "one of the deciding factors that ought to be considered" in an application for a stay.

Analysis Of The Prevailing Law

I pause here for a moment. I must take stock of the situation. I must pose this question: should there be one test or two tests or a mixture of the two tests in order to determine whether a stay ought to be granted or otherwise? In my view, it would be erroneous to proceed on the assumption that there are two tests or a mixture of the two tests in order to decide the issue of a stay. It would also be erroneous to conclude that one must adopt the disjunctive approach and say that there is a choice between the special circumstances test on the one hand with that of the nugatory approach test on the other hand. In reality, the difference between the two tests only arose after the decision in *See Teow Guan*. When the pre – *See Teow Guan* authorities are read, especially *Jasanusa Sdn Bhd* and *Dato' Hj Ghani Gilong* one would immediately adopt the special circumstances approach. Even though the then Federal Court in *Mohamed Mustafa v. Kandasami (No 2) (supra)* did not specifically refer to the special circumstances test, it did not mean that a different test was being applied. The pre – *See Teow Guan* cases must not be read with the expectation that the special circumstances test will be put to the forefront. When reading the pre – *See Teow Guan* cases, one must not read them by using the spectacles that is afforded by the post *See Teow Guan* scenario. When one reads the Federal Court case of *Mohamed Mustafa v. Kandasami (No 2) (supra)*, one would be compelled to conclude that the highest court in the country is propounding the nugatory test. Alternatively, one is also impelled to conclude that the nugatory test is only one of the tests to be applied and that the other test would be the special circumstances test propounded by Edgar Joseph Jr FCJ in *Jasanusa Sdn Bhd* and *Dato' Hj Ghani Gilong*. When his Lordship Ahmad Fairuz Sheikh Abdul Halim JCA (now FCJ) in *Gentali (M) Sdn Bhd v. Kawasaki Sunrock Sdn Bhd (supra)* employed the words "salah satu daripada faktor penentu yang wajar diambilkira ialah samada rayuan perayu, jika berjaya, akan menjadi sia-sia oleh kerana perintah penggantungan tidak diberikan padanya – sia-sia dalam ertikata perayu dilucutkan hasil kejayaannya", his Lordship was referring to the case of

Mohamed Mustafa v. Kandasami (No 2) (supra). That being the case, it is of utmost importance to know what the Federal Court in *Mohamed Mustafa v. Kandasami (No 2) (supra)* meant when it referred to the nugatory approach. The passage that was reproduced in the early part of this judgment in *Mohamed Mustafa v. Kandasami (No 2) (supra)* must be understood in its entirety. In that passage the Federal Court referred to "established judicial principles" as the foundation on which its decision must stand and whether an appeal would be rendered nugatory by the absence of a stay was, according to the Federal Court, "one of the determining factors" and not the only factor. It was because of the presence of that factor that the Federal Court in *Mohamed Mustafa v. Kandasami (No 2) (supra)* granted the stay pending appeal. Indeed if the Federal Court in *Mohamed Mustafa v. Kandasami (No 2) (supra)* elevated the nugatory test to the status of the only test to determine a stay, then it is an authority which is of sufficient legal force to counter *Jasanusa Sdn Bhd* and *Dato' Hj Ghani Gilong*.

It must be emphasised that the case of *Mohamed Mustafa v. Kandasami (No 2) (supra)* was decided under the paradigm of *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116 where Brown J applied the special circumstances test and that being the case, it can be implied that the Federal Court in *Mohamed Mustafa v. Kandasami (No 2) (supra)* applied the special circumstances test. Another significant point to emphasise would be the prevailing view that the nugatory factor is nothing more than an example of special circumstances. This point was addressed by the court in *Tac Construction & Trading v. Bennes Engineering Berhad (No 2) (supra)* particularly at p. 1644 to p. 1645 of the report and it would be ideal to reproduce those passages at this juncture:

> Across the causeway in Singapore, Yong Pung How J (as he then was) in *Lee Kuan Yew v. Jeyaratnam JB* [1991] 1 MLJ 83 refused the defendant's application for a stay of execution pending appeal and he applied the special circumstances approach and merely considered the nugatory factor to be an example of special circumstances. This was what he said at p. 51 of the report:
>
> > The court has power to grant a stay, and this is entirely in the discretion of the court, but the discretion must be exercised in accordance with established principles. In the present case, the judgment was not a summary judgment or a judgment in default, but was a judgment which was given a full trial, in which the court even has the benefit of submissions by eminent Queen's counsel on both sides. In such cases in which an unsuccessful defendant has had a full opportunity to present his case, the court should not deprive a successful plaintiff of the fruits of his victory pending an appeal, unless the unsuccessful defendant can show some special circumstances to justify the granting of a stay: *Hong Leong Finance Bhd v. Hon Hoi Weng & Ors* [1987] 2 MLJ 377. An

> example of such special circumstances would be a situation in which it can be shown by affidavit that unless a stay is granted, a successful appeal could be nugatory. (Emphasis added).

> Having laid out these general principles, I will now proceed to the heart of the matter. I will endeavour to examine all the points raised by the defendant in their attempt to seek a stay, not in its order of merit.

It is not out of place to mention that Brown J.'s decision in *Serangoon Garden Estate Ltd v. Ang Keng (supra)* is the original source of the special circumstances test and there his Lordship at p. 116 of the report aptly said that:

> Such a ground (referring to the point that the appeal of the defendant would be rendered nugatory if the plaintiff were allowed to remove his pig sty) might well be an important factor to take into consideration if there were other grounds. If, for example, another ground had been that there were merits in the appeal, that fact coupled with the fact that the defendant, if successful, could not be restored to his original position might well have afforded special circumstances to justify the learned District Judge in exercising his discretion to grant a stay; and I should not have thought it right to interfere.

Put differently but having the same effect it can be said that the nugatory principle is one of the grounds on which the court may find that there are special circumstances present warranting a stay. It is a fallacy to apply the two tests disjunctively because the nugatory test is subservient to the special circumstances test. In my judgment, in the event that the appeal would be rendered nugatory and that there are merits in the appeal, then these would constitute special circumstances. This would be the correct test to apply in deciding whether a stay ought to be granted or otherwise. That this is so can readily be supported by the decision of Edgar Joseph Jr FCJ in *Jasanusa Sdn Bhd* when his Lordship upheld the judgment of Ian Chin J, and at p. 706 of the report his Lordship reproduced the salient parts of the judgment of Ian Chin J, in these words and I shall now reproduce the relevant parts:

> The learned judge then directed himself on the law as follows (at pages 521-523):

> > Therefore, whether a successful appeal to the special commissioners would be rendered nugatory by a refusal to stay execution, is a relevant consideration.

Further down the same page of the same judgment, his Lordship Edgar Joseph Jr FCJ reproduced the pertinent parts of the judgment of Ian Chin J, in these words:

> Merits in the appeal is also a relevant consideration and support for this proposition can be found in the following passage in the case of *Serangoon Garden Ltd v. Ang Keng* [1953] MLJ 116, …. .

Spilling over to p. 707 of the same judgment, his Lordship Edgar Joseph Jr FCJ again reproduced the relevant parts of the judgment of Ian Chin J, in these words:

> …. there are myriad circumstances that would constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and would grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion.

With the greatest of respect, what the Court of Appeal tried to do in *See Teow Guan* was merely trying to restrict the special circumstances test by limiting it to a narrow area, namely, that the appeal would be made nugatory. It seemed that the learned judge in *Tneoh Hong Seng @ Teoh Hong Seng v. Dayani Sdn Bhd (supra)* arrived at the same conclusion when he said at p. 1074 the following words:

> However, it is to be recalled that at the earlier part of my judgment I have highlighted a part of the judgment of Brown J in *Serangoon Garden* which states that in a situation where the fact of not being able to be restored to the original position is coupled with the fact that the appeal has merits, such a situation or circumstances may be considered to be special circumstances. In the light of this principle, notwithstanding all that I have said in the preceding paragraphs of this judgment, in order to answer the alternative arguments put up by counsel, I consider it worthwhile to also deliberate on the argument of learned counsel for the defendant that, in the instant case, if stay is not granted, the defendant, even if it succeeds in the appeal, could not be restored to the same position as before.

In my considered view, the correct view would be that the nugatory principle is in itself a special circumstance. Bluntly put, the correct legal position of the law should be that the correct test to be applied is the special circumstances test. Thus, whether an appeal would be rendered nugatory, or otherwise is one of the factors to be considered in applying the special circumstances test. In my judgment, whether the appeal can be rendered nugatory can be construed to be a special circumstance warranting a stay and the stay would certainly be granted when there are other prevailing factors to be considered such as to preserve the subject matter of the dispute. It was sought to argue that merits in the appeal should be a ground for a stay. But I beg to disagree. I have stated in no uncertain terms that merits are not special circumstances in *All Persons In Occupation Of The House And The Wooden Stores Erected On A Portion Of Land Held Under Grant No: 26977 For Lot 4271 In The Township Of Johor Bahru, Johor v. Punca Klasik Sdn Bhd (Supra)* especially at p. 57 of the report. The same conclusion was also arrived at in the case of *Tac Construction & Trading v. Bennes Engineering Berhad (No 2) (supra)* as reflected at p. 1649 of the report. Both these two cases were based on common

ground in that they were anchored on the comments of eminent English judges and even on the speech of NH Chan J (as he then was) in the case of *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 3 MLJ 40. On the other end of the fence, there are cases which showed that merits in the appeal are considered as a ground for a stay. By way of an illustration, reference should be made to the case of *Mohamed Mustafa v. Kandasami (No 2) (supra)* where the then Federal Court held that the appeal would be rendered nugatory if the stay was not granted and hence the stay was granted. Incidentally, the Federal Court in *Mohamed Mustafa v. Kandasami (No 2) (supra)* found that there was merit in the respondent applicant's application for a stay since the value of the property was in excess of RM25,000. Another striking illustration would be the decision of Mahadev Shankar JCA in the case of *Chellapa K. Kalimuthu v. Sime UEP Properties Bhd* [1999] 3 CLJ 247 where his Lordship at p. 255 of the report remarked that:

> The primary consideration which led me to grant the application for a limited stay till the sitting of the full court is that Cik Goonting was unable to indicate whether Sime would be prepared to hold back in the meantime notwithstanding that the order made on 30 June 1997 had not been extracted. There was thus a very real danger that the appeal may be rendered nugatory.

and continuing at the same page which spills to p. 256 of the report, his Lordship said:

> There is also considerable force in Encik Karpal Singh's submission that the injunction made on 20 December 1996 was *inter partes* because the first defendant had been served. If so, it is arguable that the court had no jurisdiction to set it aside.

and finally at p. 256 of the report of the same judgment, his Lordship said:

> There is a serious question to be tried as to whether the plaintiff has a legitimate interest and expectation which this court should protect.

which necessarily showed that his Lordship Mahadev Shankar JCA was looking for the element of merits in the appeal. On reflection and with the benefit of hindsight, only the superior courts, namely, the Court of Appeal and the Federal Court have the rights to dwell into the element of merits in deciding whether it would constitute special circumstances and therefore meriting a stay. At my level, merits in the appeal have no special significance to justify a stay. The approach by Wan Adnan FCJ in *Tan Soo Bing & Ors v. Tan Kooi Fook* [1997] 1 CLJ 556 must be applauded. There his Lordship writing for the Federal Court allowed the appeal but in order to serve justice and to preserve the subject matter of the dispute, a stay was granted to maintain the *status quo*. This was what Wan Adnan FCJ said at p. 566 to p. 567 of the report:

> In the course of his submissions before us, NT Rajah, the learned counsel for the plaintiff/respondent had directed our attention to the risk of irreparable damage to the plaintiff/respondent should the registrar's caveat be removed; namely, that the interveners/appellants would probably transfer the lots concerned to *bona fide* purchasers for value while the suit remained pending. In such a situation, the plaintiff/respondent – even if he should succeed at the final hearing – might well be deprived of the fruits of his judgment and thus suffer serious prejudice. He therefore urged the preservation of the status quo by allowing the registrar's caveat to remain.
>
> For the reasons stated, we have concluded that it was *ultra vires* the powers conferred upon the registrar under s 417 of the Code to have entered the caveat. However, we are of the view that – in order that justice be served – it is necessary that the *status quo* should be maintained till all the disputes among the parties are resolved.
>
> We therefore direct that the order we have just made be stayed for eight weeks to give the plaintiff/respondent time to file an appropriate claim against the interveners/appellants in connection with the subdivided lots and to apply for an interlocutory injunction to restrain the interveners/appellants from disposing the said lots till the disposal of the claim.

and these very passages clearly showed that the nugatory principle was considered to be sufficient to create a special circumstance for a stay to be granted. The same approach was also adopted by the Court of Appeal in *Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No 2)* [1998] 3 CLJ 685.

The next path to tread would be by adopting a mixture of the two tests which can conveniently be classified as the safe approach. But, with respect, even this safe approach must be subservient to the special circumstances test which is the ultimate test in determining the issue of a stay.

It goes without saying that the court has an unfettered discretion whether to grant or refuse a stay (*Mohamed Mustafa v. Kandasami (No: 2) (supra) and Serangoon Garden Estate Ltd v. Ang Keng (supra)*) and it would always be dependent on whether there are special circumstances (*Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406) which by its very nature are not circumscribed nor limited and that each case would be dependent on its own facts. The following considerations would be taken into account in deciding whether a stay ought to be granted in the context of encl. 36:

(1) whether a successful appeal would be rendered nugatory by a refusal to grant a stay?

(2) whether irreparable damage would be done to the plaintiffs should the stay be refused because the plaintiffs may not be able to obtain the fruits of their litigation?

(3) whether the stay will be granted in order to maintain the status quo until all the disputes between the parties have been resolved (*Development & Commercial Bank Bhd v. Lam Chuan Company & Anor* [1989] 1 MLJ 318; and *Tan Soo Bing & Ors v. Tan Kooi Fook (supra)*)?

(4) even in a situation where there are no special circumstances present but where the appellants "would be irremediably injured if there was no stay should their appeals succeed," the court would still be empowered and has the discretion to grant a stay (*Development & Commercial Bank Bhd v. Che Wan Development Sdn Bhd & Ors* [1989] 2 CLJ 1200; and *Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No 2) (supra)*).

(5) where the appeal emanates from a summary application made on affidavit evidence and where the rights of the plaintiffs may be destroyed beyond redemption, a stay should be granted (*Salim bin Ismail & Ors v. Lebbey Sdn Bhd (No 1)* [1997] 1 CLJ 98; and *Jasanusa Sdn Bhd (supra)*).

and these considerations are certainly not closed and its scope can never be determined with ease and exactitude.

With these broad principles in mind, I will now proceed to apply the law to the facts in order to determine encl. 36. Two main features must be highlighted. I will consider the first feature.

The Estate Of The Deceased Will Fall Into The Sole Control Of The Defendant

This was the fear of the plaintiffs and the surviving siblings. Certainly the plaintiffs would suffer irreparable damage if the estate were to fall into the hands of the defendant. The plaintiffs would certainly not be able to return to their original positions if the stay was not granted. To deprive the plaintiffs of a stay would mean that the plaintiffs would be prevented from pursuing with the probate action and the defendant would then proceed to seal the grant of its probate in S4-22-74-1998 matter to the exclusion of the plaintiffs. In short, a refusal of a stay would not enable "justice" to "be served" (per Wan Adnan FCJ in *Tan Soo Bing & Ors v. Tan Kooi Fook (supra)*) for the benefit of the plaintiffs. A refusal of a stay would enable the defendant to take control of the estate of the deceased together with all the assets of the deceased without the necessity of going into the rigmarole of the trial. For these reasons, the stay ought to be granted in favour of the plaintiffs.

The second feature may be worded in this way:

The Defendant Can Easily Dissipate The Estate Of The Deceased Thereby Depriving The Plaintiffs The Right To Obtain A Complete Accounting For The Assets Of The Estate Of The Deceased

A refusal of the stay would certainly benefit the defendant at the expense of the plaintiffs. The defendant could easily dissipate the assets of the estate of the deceased which include shares and cash where its full value are still unknown. The plaintiffs should not be expected to wait patiently for a hearing date from the Court of Appeal without being granted a stay. There could also be other assets not known to the plaintiffs which could easily be disposed of by the defendant. Incidentally, it would be germane to mention that there were attempts to transfer out of the central depository system account the shares belonging to the deceased even before the defendant's application for probate was made. In the event the defendant were to gain sole control over the estate of the deceased, it would be next to impossible for the plaintiffs to recover the benefit received by the defendant even if the plaintiffs were to succeed in their appeal because the assets of the estate of the deceased had not been tabulated nor accounted for. Only the defendant knew the value of the assets of the deceased. It must be recalled that the defendant forcibly entered the deceased's residence and took possession of certain documents, share certificates, personal effects and chattels of the deceased. The defendant was thus privy to the assets and value of the estate of the deceased to the exclusion of the plaintiffs. It would thus be ideal to grant the stay to enable the matter to await the outcome of the appeal to the Court of Appeal.

For the reasons adumbrated above, I allowed the summons in chambers in encl. 36 especially prayer (a) (referring to the first (a)) and prayer (b) thereof.